

MICHAEL CLOUGH State Bar No. 235410
 Law Offices of Michael Clough
 6114 LaSalle Ave #833
 Oakland, CA 94611
 Telephone: (650) 274-7764
 cloughlawoffices@gmail.com
 Counsel for Defendant Russell A. Lyles, Jr.

U.S. DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	Case No.: 3:17-cr-00533-EMC
Plaintiff,)	
)	DEFENDANT LYLES' JOINDER OF
vs.)	MOTION TO DISMISS COUNTS FIVE
)	AND SIX FILED BY DEFENDANT
JONATHAN JOSEPH NELSON, et)	FOAKES AND REQUEST FOR A BILL
al,)	OF PARTICULARS.
(DEFENDANT (3) RUSSELL)	
LYLES JR.),)	
Defendant.)	
)	

Defendant Lyles hereby joins the motions to dismiss Counts Five and Six filed by Defendant Foakes, ECF #1791.

Because Lyles has not been included in Trial Group One as it is presently constituted he has repeatedly objected to any requirement that he file motions by deadlines set based on trial one's scheduled start date and the readiness of Trial Group One. No Defendant in Trial Group One filed a motion challenging the Indictment as to Counts Five and Six. For that reason, Mr. Lyles does not believe he, Defendant Foakes, or Defendant Greer, the non-Trial Group One defendants charged in Counts Five and Six, are required to file motions attacking the facial validity of Counts Five and Six at this time and reserves his right to later file

1 additional challenges to the Superseding Indictment not made by any other
2 defendant at this time.

3 Defendant Nelson has filed a motion to dismiss Count Seven. ECF #1792.
4 Because he is not charged in that Count, Defendant Lyles does not believe he has
5 standing or reason to join that motion. However, to the extent that the Government
6 may argue that Count Seven is related to Count One, Mr. Lyles joins Mr. Nelson's
7 motion in full.

8
9 **JOINDER WITH DEFENDANT FOAKES' MOTION TO**
10 **DISMISS COUNTS FIVE AND SIX**

11 Because he understands and appreciates the Court's desire to not waste the
12 time and resources of the Court and counsel by unnecessarily relitigating motions
13 on matters that affect multiple defendants, counsel for Mr. Lyles diligently and
14 carefully read Mr. Foakes' motion challenging Counts Five and Six in the
15 Superseding Indictment, ECF #1791, and hereby joins it on the following grounds:

16 1. Counts Five And Six Are Insufficient Because, As To
17 Defendant Lyles, The Superseding Indictment Fails To Plead Critical
18 Elements Of A VICAR Charge Adequately And With Specificity.

19 Defendant Foakes' motion correctly identifies the elements of a VICAR
20 offense and the reasons that it was insufficiently pleaded as to him. ECF #1791, p.
21 15-18. Defendant Lyles hereby adopts the authority and argument in that motion.

22 Additionally, based on the Superseding Indictment and the discovery he has
23 received in the more than three years since he was charged in Counts Five and Six,
24 Mr. Lyles has no idea as to the specific role he is alleged to have played in the
25 commission of Counts Five and Six, or how whatever actions the Government may
26 believe he took in relation to the crimes alleged in Counts Five and Six were "for
27 the purpose of gaining entrance to or maintaining or increasing position in the
28 enterprise." Because those elements of Counts Five and Six are not adequately

pleaded in the Superseding Indictment, Mr. Lyles has no effective notice of the only two substantive charges alleged against him in this case. For that reason, Counts Five and Six should be dismissed as to him. In the alternative, as requested below, Mr. Lyles requests that the Court order the Government to provide him with a bill of particulars as to those elements of Counts Five and Six.

2. Counts Five and Six Must be Dismissed for Insufficiency as the State Offenses Are Not a Categorical Match with the Generic Federal Offenses.

Defendant Lyles hereby joins this motion based on the authority and reasons stated in Defendant Foakes' motion, ECF #1791, p. 18-21.

3. Counts Five and Six are Insufficient Because the Counts do not Allege a Substantial Effect on Interstate Commerce.

Defendant Lyles hereby joins this motion based on the authority and reasons stated in Defendant Foakes' motion, ECF #1791, p. 21.

**REQUEST FOR A BILL OF PARTICULARS AS TO THE
VICAR ELEMENTS OF COUNTS FIVE AND SIX**

Pursuant to Federal Rule of Criminal Procedure 7(f), Defendant Lyles requests and moves for an order requiring the Government to provide a Bill of Particulars to give him sufficient notice as to the VICAR allegations necessarily included in Counts Five and Six. Such a bill is necessary to permit him to prepare adequate defenses to that charge, avoid surprise at trial and allow him to assert his Fifth Amendment rights against Double Jeopardy should he not be convicted in this proceeding.

Specifically, with regard to Count Five and Count Six, Defendant Lyles requests that the Court order the Government to specify:

1. The role that it intends to prove Mr. Lyles played in the "maiming" of "Victim 5" alleged in Count Five and the "assault with a dangerous weapon"

1 alleged in Count Six including whether the Government intends to allege that he
2 personally participated in the alleged “maiming” and “assault.”

3 2. If the Government alleges that Mr. Lyles personally participated in the
4 alleged maiming and assault, the specific time on November 26, 2016 that the
5 Government alleges the alleged maiming and assault took place.

6 3. If the Government alleges that Mr. Lyles personally participated in the
7 alleged maiming and assault, the specific ways in which Mr. Lyles participated in
8 the alleged maiming and assault.

9 4. If the Government alleges that Mr. Lyles “aided and abetted others,”
10 the specific ways and means -- i.e. actions, assistance, communications, etc. -- by
11 and through which Mr. Lyles allegedly aided and abetted the alleged maiming and
12 assault.

13 5. The Government’s theory as to how the alleged maiming and assault
14 of Victim 5 “maintained” or “increased” Mr. Lyles’ “position in the alleged
15 enterprise.”

16 6. Whether and, if so, how the alleged enterprise differs from the
17 Sonoma Charter of the Hells Angels.

18 **Background**

19 Immediately after Mr. Lyles surrendered and was taken into custody,
20 counsel wrote to the prosecutors in this case, stated that he had no specific
21 information that would allow him to ascertain the basis for the substantive charges
22 against Mr. Lyles. Specifically, he wrote:

23 ... I have no knowledge as to whether the government is alleging that
24 Mr. Lyles personally maimed or assaulted victim 5, or, in the
25 alternative, that he is culpable only as an aider and abettor. Indeed, I
26 have no information that would allow me to determine if the
27 government intends to allege that Mr. Lyles was present when victim
28 5 was allegedly maimed and/or assaulted, or even that he had
knowledge that victim 5 was allegedly maimed.

1 Letter from Attorney Michael Clough to AUSA Barry and AUSA Cornell,
2 December 17, 2017.

3 In the 41 months since counsel wrote that letter, the only discovery that
4 counsel has received mentioning in any way Mr. Lyles' alleged role in the alleged
5 "maiming" is a single report of an interview that, because it is designated as AEO,
6 he cannot discuss with his client -- and that report is inconsistent with accounts
7 included in other reports. In addition, although the Government subpoenaed Mr.
8 Lyles' call detail records immediately after the November 26, 2016 incident, the
9 Government has never disclosed those records to counsel for Mr. Lyles; and,
10 despite repeated discovery requests, the Government has never offered any
11 explanation as to why it has not produced those records.

12 **Legal Authority**

13 As elaborated in detail in the motion for a bill of particulars filed by
14 Defendant Wendt, "An indictment is required to describe in plain, concise, and
15 definite language the essential facts constituting the offense." ECF #1789, pp. 14-
16 16 (citing generally, *United States v. James*, 980 F.2d 1314, 1316-1317 (9th Cir.
17 1992) cert. denied, 510 U.S. 838 (1993). Defendant Lyles hereby adopts the
18 following clearly stated argument included in Wendt's motion:

19 In determining if a Bill of Particulars should be ordered in a specific
20 case, a court should consider whether the defendant has been advised
21 adequately of the charges through the indictment and all other
22 disclosures made by the government. *United States v. Giese*, 597 F.2d
23 1170, 1180 (9th Cir. 1979) cert denied, 444 U.S. 979. An indictment
24 must furnish the defendant with a sufficient description of the charges
25 against him to enable him to prepare his defense, to ensure that the
26 defendant is prosecuted on the basis of facts presented to the grand
27 jury, and to inform the court of the facts alleged so that it can
28 determine the sufficiency of the charge. *Russell v. United States*, 369
U.S. 771, 763, 768 n. 15, 771 (1960); *United States v. Keith*, 605 F.2d
462, 464 (9th Cir. 1979); *United States v. Pheaster*, 544 F.2d 353, 360
(9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977). A motion for Bill
of Particulars is appropriate where a defendant requires clarification in

1 order to prepare a defense. *Wills v. United States*, 389 U.S. 90, 99
 2 (1967); *United States v. Long*, 706 F.2d 1044, 1054 (9th Cir. 1983).
 3 This is because a defendant is entitled to understand the basis for the
 4 government's case. *United States v. Ryland*, 806 F.2d 941, 942 (9th
 5 Cir. 1986) cert. denied, 481 U.S. 1057 (1987).

6 ECF #1789, p.15. Defendant Lyles further adopts the arguments and authority
 7 supporting an order for a Bill of Particulars offered in Defendant Ranieri's motion
 8 for a Bill of Particulars. ECF #1791, pp. 8-9.

9 **Summary and Conclusion**

10 It is truly astounding that more than 41 months after Mr. Lyles was arrested,
 11 taken into custody, and not released for two months based largely on Count Five
 12 and Count Six, the Government has failed to provide him with any basis to know
 13 what the Government intends to argue at trial regarding his alleged role in the
 14 alleged maiming and assault -- or who the witnesses against him are likely to be.
 15 Instead, because of the Government's pretense that the identities of Victims 5 and
 16 Victim 6 are unknown, the AEO protective order that was imposed in January
 17 2019 and tightened in August 2019, and what counsel for Mr. Lyles believes was
 18 an improperly filed motion for an OSC that has chilled and deterred efforts to
 19 investigate the November 26, 2016 incident, counsel has not even been able to
 20 engage Mr. Lyles in the preparation of his own defense.

21 For these reasons, Defendant Lyles submits that this Court should dismiss
 22 Count Five and Count Six as to him, or, alternatively, grant his request for a bill of
 23 particulars.

24 DATED: May 24, 2021

25
 26 /s/ Michael Clough
 27 MICHAEL CLOUGH
 28 Attorney for Defendant
 RUSSELL LYLES Jr.